

RECENT DEVELOPMENT

***ANDERSON V. BURSON*: A BANK WAS A NONHOLDER IN POSSESSION OF AN UNINDORSED MORTGAGE NOTE AND HAD HOLDERSHIP RIGHTS UNDER THE “SHELTER RULE” WHEN THE HOMEOWNER’S CONCESSIONS ESTABLISHED THE NOTE’S CHAIN OF POSSESSION.**

By: Jeffrey R. Maylor

The Court of Appeals of Maryland held that a non-holder in possession of a mortgage gained holdership status pursuant to the “Shelter Rule” and, therefore, could enforce an unindorsed mortgage note. *Anderson v. Burson*, 424 Md. 232, 35 A.3d 452 (2011). The non-holder has the burden to prove the instrument’s entire transfer history to establish holdership rights, but the court may rely on the opposing party’s factual concessions to find the successful transfer of the note. *Id.* at 252, 35 A.3d at 464.

Hosea and Bernice Anderson (“Andersons”) refinanced their home mortgage with Wilmington Finance, Inc. (“Wilmington”) in October 2006. The Andersons signed the deed of trust in favor of Wilmington, but only Mr. Anderson signed the promissory note. Saxon Mortgage Services, Inc. (“Saxon”) serviced the mortgage, and collected the Andersons’ payments. After Mr. Anderson signed the promissory note (“Note”), it was transferred three times, but not indorsed. Wilmington transferred the Note to Morgan Stanley Mortgage Capital Holding, Inc. (“Morgan Stanley I”), which then transferred it to Morgan Stanley ABS Capital I, Inc. (“Morgan Stanley II”). Morgan Stanley II then securitized the Note with other mortgages into the Morgan Stanley Home Equity Loan Trust 2007 2 (“Morgan Stanley Trust”). The Morgan Stanley Trust’s pooling and servicing agreement (“PSA”) listed Deutsche Bank Trust Company Americas (“Deutsche Bank”) as trustee, and Saxon as the loan servicer.

The Andersons defaulted on their Note obligations in 2007. Subsequently, on February 21, 2008, the agents of Deutsche Bank commenced foreclosure proceedings in the Circuit Court for Howard County. Deutsche Bank filed an order to docket, including a motion for acceptance of lost note affidavit, which the circuit court granted. The Andersons challenged Deutsche Bank’s right to enforce the Note and filed for injunctive relief. The circuit court temporarily enjoined the foreclosure proceeding until a hearing could be held regarding the Andersons’ injunction request.

At the first hearing, Deutsche Bank produced a photocopy of the unindorsed Note. The court was not satisfied with the photocopy of the Note and rescheduled the hearing to determine Deutsche Bank's right to enforce the Note. At the second hearing, Deutsche Bank produced the original unindorsed Note, but failed to bring a copy of the PSA as requested by the Andersons. Both parties and the court agreed to a continuance. At the third hearing, Deutsche Bank produced an undated, unattached allonge. The allonge was signed by Wilmington and purportedly transferred the Note to Deutsche Bank, though it lacked the indorsements of the two parties to which the Note was transferred before Deutsche Bank. The allonge contained a Saxon loan number that matched a handwritten number on the Note, but did not match the Wilmington loan number.

The circuit court denied the Andersons' injunction request, despite the indorsement gaps in the Note's history, and held that the allonge established that the Note was properly indorsed to Deutsche Bank. As a result, the circuit court concluded that Deutsche Bank was the holder of the Note. The Court of Special Appeals of Maryland affirmed, finding that Deutsche Bank was entitled to enforce the Note under the "Shelter Rule." The Court of Appeals of Maryland then granted the Andersons' petition for a writ of certiorari.

The Court of Appeals of Maryland began their analysis by addressing the Andersons' assertion that because Deutsche Bank claimed the Note was lost or destroyed, it could not have possessed the Note at the time the suit was filed. *Anderson*, 424 Md. at 244, 35 A.3d at 459. The court concluded that remand of this case would be impractical because Deutsche could re-file with the original note and, when combined with the Andersons' concessions, default, and acknowledgment of the existence of the debt, it was very likely that Deutsche Bank would prevail. *Id.* at 244, 35 A.3d at 459-60.

The court then provided an overview of the general rules governing a negotiable promissory note. *Anderson*, 424 Md. at 246-47, 35 A.3d at 460-61. Those entitled to enforce a negotiable instrument are either holders, transferees in possession of the instrument with the rights of a holder, or persons not in possession who are entitled to enforce pursuant to section 3-309 of the Commercial Law Article of the Maryland Code. *Id.* at 247, 35 A.3d at 461. A negotiation occurs when a holder transfers possession of an instrument and indorses the instrument. *Id.* at 246-47, 35 A.3d at 461 (citing MD. CODE ANN., COM. LAW § 3-201(a)-(b) & cmt. 1 (1997)). A negotiation automatically vests in its holder the right to enforce the instrument. *Anderson*, 424 Md. at 247, 35 A.3d at 461. Alternatively, a transfer

requires that the transferor intend to confer in the transferee the right to enforce the instrument and deliver the instrument so that the transferee has actual or constructive possession. *Id.* at 246, 35 A.3d at 461 (citing MD. CODE ANN., COM. LAW § 3-203(a)-(b) (2002)). The “Shelter Rule” establishes that a non-holder in possession may enforce an instrument if the transferor was a holder, because a transferee obtains the rights of the transferor or holder. *Anderson*, 424 Md. at 248, 35 A.3d at 462 (citing COM. LAW § 3-203 cmt. 2 (2002)). The transferee of an unindorsed note must prove their status as a non-holder in possession by establishing the successful transfer of the note from the holder. *Anderson*, 424 Md. at 248-49, 35 A.3d at 462 (citing COM. LAW § 3-203 cmt. 2).

Based on these distinctions, the court concluded that Deutsche Bank was a transferee rather than a holder because, while Deutsche Bank possessed the Note, Wilmington did not indorse it and thus never negotiated the Note. *Anderson*, 424 Md. at 247-48, 35 A.3d at 461-62. Further, the court could not rely on the allonge as evidence of a negotiation because it was signed by Wilmington after Wilmington already transferred the Note to Morgan Stanley I and no longer had rights in the Note to transfer. *Id.* at 247-48, 35 A.3d at 462.

Under the “Shelter Rule,” because Wilmington was the payee and thus holder of the Note, the series of transfers from Wilmington to Deutsche conferred Wilmington’s holdership rights only if Deutsche Bank could prove every prior transfer. *Anderson*, 424 Md. at 249, 35 A.3d at 462-63 (citing COM. LAW § 3-203 cmt. 2 (2002)). However, Deutsche Bank failed to do so and, as a non-holder in possession, could not prove every prior transfer necessary to enforce the Note. *Anderson*, 424 Md. at 249, 35 A.3d at 463. Deutsche Bank could not rely on the PSA to prove the transfer of the Note because the portion of the PSA submitted to the court did not show that Morgan Stanley II transferred the Note to Deutsche Bank. *Id.* at 250, 35 A.3d at 463.

Even though Deutsche Bank failed to prove the entire transfer history of the Note, the court was able to rely on the Andersons’ factual concessions. *Anderson*, 424 Md. at 252, 35 A.3d at 464 (citing *Weil v. Free State Oil Co.*, 200 Md. 62, 66, 87 A.2d 826, 827 (1952)). At trial, the Andersons’ attorney acknowledged that the Note was part of the Morgan Stanley Trust when he rhetorically asked a witness for Deutsche Bank if the Morgan Stanley Trust was the current location of the Note. *Anderson*, 424 Md. at 251, 35 A.3d at 464. Also, the Andersons conceded in their reply brief to the Court of Special Appeals of Maryland that Deutsche Bank currently held the Note. *Id.* Accordingly, the court concluded that the Andersons’ concessions

established the Note's transfer history, giving Deutsche Bank the right to enforce the Note through foreclosure. *Id.* at 252, 35 A.3d at 464. The court affirmed the judgment of the Court of Special Appeals of Maryland, and concluded that Deutsche Bank could enforce the Note as non-holders in possession with the right to enforce the instrument. *Id.*

In *Anderson*, the Court of Appeals of Maryland clarified Maryland law regarding the enforcement of unindorsed mortgage notes upon default. Practitioners representing the transferees of an unindorsed note can enforce the note as a non-holder in possession as long as they can prove each transfer of the note from the point of origin until it was transferred to their client. Homeowners must be careful in conceding any fact related to the transfer of their note because the court can use those concessions to prove the transfer history on appeal. Attorneys representing borrowers that possess the information necessary to prove the transfer history of the note should consider compromising with the bank in order to find a more amiable resolution to the foreclosure proceeding.